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CHARLES ELMORE

Nos. 469 and 470

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE L. SHEARER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

WILLIAM A. W. STEWART, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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White v. *Maddison*, 45 F. (2d) 335 — 5

Statute:

Revenue Act of 1924, c. 234, 43 Stat. 253, 262, 275, 352, 353, 354—

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose these petitions.

OPINIONS BELOW

These cases were consolidated for hearing before the Board of Tax Appeals and disposed of in one

opinion (No. 469, R. 17–20; No. 470, R. 18–21) which is reported in 18 B. T. A. 393. The Circuit Court of Appeals also heard the cases together and rendered one opinion (No. 469, R. 34–41; No. 470, R. 36–43), 52 F. (2d) 17.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1931. (R. 41–42.) The petition for a writ of certiorari in each of said cases was filed October 19, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioners in 1925 filed their individual returns for the calendar year 1924 and reported thereon their shares of the income from a partnership having a fiscal year ending April 30, 1924. Were they entitled under the provisions of Title XII of the Revenue Act of 1924 to receive a reduction of 25 per centum of the tax on that portion of such partnership income which was taxable at 1923 rates under Section 207 (b) of the Revenue Act of 1924?

STATUTE INVOLVED

The statutes involved are set forth in the appendix, pp. 6–8, *infra*.

STATEMENT

The record references herein made are to No. 469, and as the facts in each of the cases are conceded with the exception of the amounts involved no reference will be made to No. 470. The facts may be summarized as follows (R. 18–19):

The petitioners made and filed their individual income-tax returns on the basis of the calendar year 1924. The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924. The Commissioner determined the net income of petitioner Shearer for the calendar year 1924 to be $103,613.53, of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $3,071.67 and that the tax on the income attributable to 1923 was $27,244.32. The Commissioner determined the net income of petitioner Stewart for the calendar year 1924 to be $91,165.35, of which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $688.43 and that the tax on the income attributable to 1923 was $23,732.92.

Each of the petitioners has contended throughout that he was entitled to receive a reduction of 25 per centum of the tax on that portion of the partnership income attributable to the year 1923. This contention was rejected by the Commissioner, and his determination was sustained by the Board of Tax Appeals and by the Circuit Court of Appeals.

DISCUSSION

We submit that the decisions below were correct. For present purposes it seems sufficient to refer merely to the opinion of the Circuit Court of Appeals in the instant case (R. 35–41) and to the opinion in the *Appeal of Colip,* 5 B. T. A. 123, which decided the question in accordance with the Commissioner's determination and has been uniformly followed by the Board of Tax Appeals in numerous cases.

The point involved appears to be of little importance. It seems improbable that in the case of any taxpayer any large amount will turn upon it, and it applies to only one year and affects only taxpayers reporting for the calendar year 1924 who received income as members of a partnership having a fiscal year other than the calendar year ending in 1924. It is impossible to ascertain whether many cases are pending involving this point. The only such cases pending before any court, of which we are aware, are *Shannon & Luchs* v. *Commissioner* in the Court of Appeals of the District of

Columbia and *Westfeld* v. *Commissioner* in the Circuit Court of Appeals for the Fifth Circuit.

The decision below is, however, directly in conflict with that of the Circuit Court of Appeals for the First Circuit in *White* v. *Maddison*, 45 F. (2d) 335, and because of that fact and the pendency of the cases above mentioned we are not inclined to oppose the granting of the writ, although we do not urge it.

Respectfully submitted.

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NOVEMBER, 1931.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 262, 275, 352, 353, 354:

SEC. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed. (U. S. C., Title 26, Sec. 959.)

SEC. 207. (b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full

fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year. (U. S. C., Title 26, Sec. 938.)

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

Title II (called "Income Tax") as of January 1, 1924; * * *.

TITLE XII.—REDUCTION OF INCOME TAX PAYABLE IN 1924

SEC. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

SEC. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and end-

ing in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

U. S. GOVERNMENT PRINTING OFFICE: 1931